STATE OF MICHIGAN
in the
SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter, Walter Mackey, Barbara Mackey, Gary Gibson, Ellen Gibson, Ted Jungkuntz, Loise Jungkuntz, David Sponseller, Mary Sponseller, Mike Gladieux, Martha Gladieux, Helen Rysse, Terry Trombley, John Williams, and Therese Williams,

Plaintiffs-Appellants,

v

Ann Arbor Public Schools a/k/a the Public Schools of the City of Ann Arbor, Board of Education, Ann Arbor Public Schools, Karen Cross, in her official capacity as President of the Board of Education for Ann Arbor Public Schools; and Glenn Nelson, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools.

Defendants-Appellees,

-and-

Ann Arbor Education Association, MEA/NEA,

Intervening Defendant-Appellee.

/

Supreme Court No. 128768

Court of Appeals No. 253565

Circuit Court No. 03-1046-CZ

128768

INTERVENING DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law

Statutes

Other Authorities

SUPPLEMENTAL STATEMENT OF ISSUE ON APPEAL

I. **Did Plaintiffs-Appellants fail to make a proper demand in advance of filing suit, thereby failing to meet the standing requirements of MCL 129.61?**

Intervening Defendant-Appellee's Answer:	YES
Defendants-Appellees' Answer:	YES
Circuit Court's Ruling:	YES
Court of Appeals Ruling:	YES
Plaintiffs-Appellants' Answer:	NO

ARGUMENT

I. PLAINTIFFS-APPELLANTS LACK STANDING TO SUE PURSUANT TO MCL 129.61 BECAUSE THEY FAILED TO ISSUE AN EFFECTIVE DEMAND.

At issue before the Court is whether Plaintiffs-Appellants complied with the demand requirement of MCL 129.61 prior to filing their taxpayer lawsuit. That statute sets forth the basic requirements for taxpayers wishing to sue a township or school district for an accounting and/or return of misappropriated funds. MCL 129.61 provides as follows:

> Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by an public officer, board or commission of such political subdivision. **Before such suit is instituted, a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto**. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings. (Emphasis added.)

The AAEA agrees with the Court of Appeals that the demand requirement was not met, either according to the letter or spirit of the statute.

An understanding of the purpose of the demand requirement is paramount to determining whether the requirement was satisfied. A basic tenet of statutory construction requires the ordinary, plain meaning be given to the words selected by the legislature. *Koontz* v *Ameritech Services, Inc.,* 466 Mich 304, 645 NW2d 34 (2002). Turning to the language of the statute, the demand requirement is clearly intended to notify the person(s) obligated to institute an action for an accounting or recovery of

misappropriated or unlawfully expended funds that such a suit will be filed, absent action on his/her/their part. This intent can be readily gleaned from the words themselves. First, the statute recognizes the right of any taxpayer to institute a lawsuit on behalf of the treasurer "for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended" by a public body. However, the next sentence creates a condition precedent to filing such suit in the form of the demand requirement. This requirement mandates a demand be made on the appropriate public officer or body who would be responsible for maintaining such a suit, and that the recipient of this demand neglect or refuse to take action pursuant to the demand. This allows the correct public official or body the first opportunity to correct the problem or sue. Thus, the purpose of the demand requirement is hardly cryptic or complex. Plaintiffs-Appellants' argument that the purpose of the demand requirement is to halt the expenditure, not demand legal action, ignores the clear language of the statute and, as such, fails.

The Court of Appeals was correct in using the ordinary dictionary meaning of the term "demand" when deciphering its meaning in the context of the statute. At page 5 of its opinion, the Court quoted the definition of "demand" found in the *Random House Webster's College Dictionary* (1997) as, "to ask for with proper authority; claim as a right." *Rohde* v *Ann Arbor Public Schools*, 265 MichApp 702, 698 NW2d 402 (2005). An alternative definition is "to ask for boldly or urgently." *Webster's New World Dictionary, Second College Edition* (1980). Thus, urgency is an element of demand lending itself to another purpose of the demand requirement, which is the prevention of stale claims. However, in this case, Plaintiffs-Appellants waited nearly three years from

the date of their initial requests before filing suit. As a matter of common sense, preventing stale claims requires that legal action be taken in a timely manner after providing notice and an opportunity to cure. A significant time lag, like that occurring in this case, has the potential to force a very different composition of the public body to defend against claims aimed at actions of their predecessors. This is precisely what happened in this case, where membership of the board changed over time because of Plaintiffs-Appellants' delay in filing suit. It cannot be presumed that the legislature intended such a delay in action without subsequent communication between the taxpayers and the public body. After all, the statute in question provides a means to police against the waste of taxpayer money. It is hard to imagine a greater waste of taxpayer money than to have a public body defending against actions of its predecessor when timely notice through a proper demand may have resolved the claim. The demand requirement envisions some form of urgency, while also expecting a reasonable period to cure before action commences.

Demand requirements such as this one have long been recognized at common law by jurisdictions without benefit of a taxpayer lawsuit authorization statute like MCL 129.61.[1] Such courts have observed the necessity of the demand requirement to prevent undue burden on the court system and to allow public bodies to correct mistakes without the necessity of legal proceedings. In *City of Chicago ex rel Konstantelos* v *Duncan Traffic Equipment Co.*, 95 Ill2d 344, 447 NE2d 789 (1983), a taxpayer brought suit on behalf of the city alleging a city contractor had submitted bills

1 Reed v Cunningham, 126 Iowa 302, 101 NW 1055 (1905); Schaefer v Berinstein, 140 CalApp2d 278, 295 P2d 113 (1956); Weitzman v Cook County, 133 IllApp3d 1013, 479 NE2d 957 (1985); Cobb v Shelby County Bd of Comm'rs, 771 SW2d 124 (Tenn., 1989).

for parking meter inspections which never occurred. The contractor challenged the taxpayer's standing since no demand was alleged in the complaint. The taxpayer claimed that the Illinois statute did not require such a demand. This led the Illinois Supreme Court to delve into the purpose and necessity of demand requirements in general. "The reasons for requiring that a demand be made upon the proper public officials prior to the bringing of a taxpayers' action is the underlying presumption that public officers, in the absence of any showing to the contrary, are ready and willing to perform their duties." *City of Chicago ex rel Konstantelos,* supra. Ultimately, the court found the common law demand requirement was so important that it applied even though the statute itself was silent about it. "If the demand requirement did not exist for...taxpayer suits, overofficious citizens could frustrate the orderly administration of governmental responsibilities, and such citizens would be encouraged to substitute their discretion for that of those to whom the law has confided that discretion." *ibid.*

Plaintiffs-Appellants' request letters did not come close to meeting the standard intended by the legislature, as reflected by the language used in the statute. In fact, the request letters did not allege the recipient's obligation to take action, did not request an accounting, did not seek recovery of misappropriated funds, and did not notify the recipient of intent to pursue legal action in the event of noncompliance with the request. Nowhere in the request letters did the term "demand" even appear. Instead, as noted by the Court of Appeals at page 4 of its opinion, these requests simply stated as follows:

> I [or We] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District's extension of these benefits to its employees exceeds its authority and

> violates the state law governing marriage. I [or We] ask that you halt this illegal use of public funds at your earliest possible convenience. *Rohde*, supra.

It would take some stretch of the imagination to entertain the notion that this cordial letter was effective in providing notice of impending legal action, as envisioned by the statutory demand requirement. Instead, the letter serves more as an exercise of free speech than a demand. Plaintiffs-Appellants used the letter to convey what they "believe" concerning domestic partner benefits. Nowhere did they threaten legal action or demand that anyone else pursue legal action. A reasonable person would not read this request as the equivalent of an ultimatum to take action. As such, Plaintiffs-Appellants failed to act in accordance with even the spirit of MCL 129.61 because the content of their request letters is so sorely deficient.

Plaintiffs-Appellants take issue with the notion that their letters should have used the word "demand" instead of "request." They argue that this is just a matter of semantics and that they should not be penalized for failing to use the "magic words." Apparently Plaintiffs-Appellants would have this Court ignore the fundamental rule of statutory construction which requires meaning to be given to every word wherever possible. *People* v *Warren*, 462 Mich 415, 615, NW2d 691 (2000). Or perhaps Plaintiffs-Appellants would simply have this Court read the term "demand" to be something less than it is. The Court of Appeals did not require use of any "magic words," but instead required the letter to reasonably communicate a demand, through the use of that word or otherwise. The statute calls for a demand. No demand was made. No reference to litigation was made. No reference to the statute that required a demand was included. Plaintiffs-Appellants' request letters were deficient and cannot

reasonably be considered "demands" complying with the statute.

Aside from the content of the demand, equally important is upon whom the demand is made. The statute requires that a taxpayer suit be brought "on behalf of or for the benefit of the treasurer." The next sentence states that the demand must be made "on the public officer, board or commission whose duty it may be to maintain such suit." At page 5 of its opinion, the Court of Appeals opined that the treasurer is "the officer likely responsible for maintaining such a lawsuit." *Rohde*, supra. Letters were sent to the county prosecutor, Governor, and Attorney General, but not to the board's treasurer, the official with the authority and responsibility to ensure that the board was expending funds in accordance with law.

Plaintiffs-Appellants argue that the treasurer is not the only correct entity to receive a demand. They contend the board itself would have a duty "to maintain such a suit." There are two problems with this argument.

First, if Plaintiffs-Appellants believed the board was the appropriate entity to receive their demand, why did Plaintiffs-Appellants fail to send its request to all members of the board, including the treasurer? Sending a demand to some, but not all, members of a public body is not sufficient to meet the statutory demand requirement. If this were the case, how few members must receive a taxpayer's demand? A majority? A few? Just one? If the demand is not made on the correct individuals, a public body's right to pursue legal action first may well be lost. Taxpayers could effectively circumvent public bodies and defeat the purpose of the demand requirement by making demand on select members of a body rather than all members. It would be ideal to target members who rarely attend meetings or who find themselves in a minority on the

board because taxpayers could more easily access the courts this way. This Court should avoid Plaintiffs-Appellants' attempt to weaken the terms of the demand requirement, and avoid the slippery slope which could disadvantage public bodies and, in turn, cause undue burden on the courts.

Second, Plaintiffs-Appellants make much of the notion that a public body should not be expected to sue itself, so the demand requirement works a legal absurdity. In fact, the statute does not require a public body to sue itself. It requires that a demand be served on the "public officer, board or commission whose duty it may be to maintain such a suit." MCL 129.61. In this case, the term "public officer" is applicable, because the treasurer is the correct person to guard public funds administered by the board as a whole. The statute even anticipates the treasurer is typically the party in interest by requiring the suit be brought "on behalf of or for the benefit of the treasurer." *ibid.* It is not for the Plaintiffs to "second guess" the legislature concerning the need for a demand requirement. As such, Plaintiffs-Appellants are mistaken in asserting that by notifying some members of the board, but not the treasurer, they have met the requirements of the statute.

Because the language of the statute requires that the demand requirement and subsequent failure to act occur "[b]efore such a suit is instituted," Plaintiffs-Appellants failed to satisfy a condition precedent to their taxpayer suit, and their claim must be dismissed. *ibid.* In *Hallstrom* v *Tillamook County*, 493 US 20, 110 SCt 304 (1989), the U.S. Supreme Court ruled that a notice requirement in the Resource Conservation and Recovery Act of 1976 (RCRA) was also a condition precedent to a taxpayer action. The provision required taxpayers to wait at least 60 days after notifying the

Environmental Protection Agency (EPA), state in which the violation occurred, and the alleged violator before pursuing legal action for violation of the regulations. The purpose of the provision was to enable to affected parties to cure the problem prior to institution of legal proceedings. In that case, while the taxpayer notified the violator before taking legal action one year later, he had not notified the EPA or the state. The Supreme Court ruled that suspending the proceedings to enable the taxpayer to serve the required notices was a violation of the statute, which prohibited institution of legal proceedings before expiration of the 60 day period. The notice requirement was a condition precedent to a taxpayer suit, and absent strict adherence to the requirement, the suit must be dismissed.

In reaching its conclusion, the Court was sympathetic to the taxpayer's urgings not to dismiss the case in light of the years of litigation that preceded the Court's ruling. However, the Court noted that, as in this case, "[p]etitioners remain free to give notice and file their suit in compliance with the statute..." *Hallstrom*, supra.

CONCLUSION

Based on the foregoing, Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61 based on their failure to comply with the demand provision of that statute. They have failed to establish on appeal that they made proper demands on the proper people as required by the letter and spirit of the statute. As such, this Court should find that both courts below were correct in determining the "demand" requirement of MCL 129.61 was not satisfied and Plaintiffs-Appellants, therefore, lack standing.

RELIEF REQUESTED

WHEREFORE, Intervening Defendant-Appellee, the Ann Arbor Education Association, MEA/NEA, respectfully requests that this Court deny Plaintiffs-Appellants' Application for Leave to Appeal.

Respectfully Submitted,

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